Comments of David Inserra and Brent Skorup in Response to FCC "Delete, Delete, Delete" Initiative

We appreciate the opportunity to provide information related to the Federal Communication Commission (FCC)'s "Delete, Delete, Delete" initiative. This comment does not represent the views of any particular party or interest group but is intended to assist the FCC in eliminating rules that undermine free expression or constitutional restrictions on federal agencies. We seek to emphasize two key items worth deleting:

- *The FCC's news distortion rule.* It is unnecessary in the modern media landscape and harmful to expression by threatening politically motivated accusations and investigations.
- *The FCC's Universal Service Fund contribution methods and rules.* The Fund's current contribution methods function as an unauthorized tax on telecommunications companies and raise consumers' rates unnecessarily.

The News Distortion Rule

The FCC has long claimed the authority to deny or revoke the license of a broadcaster if they find that the broadcaster has engaged in "deliberate distortion" of news regarding a "significant event and not merely a minor or incidental aspect of the news report." The FCC has reaffirmed this uncodified rule multiple times in its history, most recently in a July 14, 2024 guidance document on the FCC's website.[1]

The FCC describes its authority here as "narrow" and with significant protections for the expressive rights of broadcasters. Historical and current uses of the news distortion rule, however, show that this rule is hopelessly subjective and liable to abuse for political ends.

Even though the FCC does not enforce the news distortion rule strictly, slighted parties can compel an FCC investigation so long as the FCC maintains the rule. In the 1998 *Serafyn v. CBS* case, for instance, a Ukrainian-American accused CBS of unfairly editing a program to smear the Ukrainian people.[2] The FCC declined to pursue the complaint because it did not want to chill the editorial choices of broadcasters, but Mr. Serafyn successfully sued and compelled the FCC to

[1] Federal Communications Commission, "Broadcast News Distortion," last updated July 18, 2024.
[2] Serafyn v. FCC, 149 F.3d 1213 (D.C. Cir. 1998).

enforce its rules against news distortion and investigate CBS's editing choices (CBS then settled with the Ukrainians before the FCC could investigate).

The news distortion rule, then, serves as a tempting regulatory weapon for members of the public, activists, and politicians. During the Biden administration, for instance, a group challenged a local FOX broadcaster for its 2020 election programming, a challenge that was not closed by the FCC for over a year.[3] And currently, this FCC is investigating news distortion complaints filed against CBS for its alleged distortion of a 60 Minutes interview with then-Vice President Kamala Harris.[4] Those complaints were filed in the heat of the 2024 Presidential election.

These investigations and inquiries fundamentally hinge on subjective and unanswerable questions of what is "misleading" or "distorted" news, and what is a "significant" rather than a "minor" distortion. For example, while the FCC claims that it has set a high standard of "deliberately" misleading or distorting, what is misleading is often in the eye of the beholder. TV journalists, like Americans generally, range from left-wing to right-wing and can feature the same news stories using the same facts, yet present very different stories to their audiences. In many cases, news reporting means making editorial decisions to frame a story one way, to emphasize certain details or pieces of context while downplaying or omitting others, and perhaps even favoring one party or viewpoint over another. The news distortion rule, then, is too often selectively enforced based on the politics of the Commissioners, the broadcaster, and the members of the public who have the wherewithal and motivation to file a complaint.

Even more insidious, then, is the chilling effect this rule has by its sheer existence. A news broadcaster has a sword of Damocles hanging over its head whenever it reports on political or controversial content as many parties may consider the broadcaster to be distorting or slanting the news. And broadcasters must not only consider the current FCC, but what the FCC will look

[3] Petition to Deny, *Application of FOX Television Stations, LLC for Renewal of License of WTXF-TV, Philadelphia, Pennsylvania*, LMS File No. 0000213362 (July 2023).
[4] Federal Communications Commission, "FCC Establishes MB Docket No. 25-73 and Comment Cycle for News Distortion Complaint Involving CBS Broadcasting Inc., Licensee of WCBS, New York, NY," Feb. 5, 2025, and Center for American Rights, *Petition to Condition Grant by the Center for American Rights*, MB Docket No. 24-275 (filed Dec. 16, 2024).

in the future under a different administration or chairman. As such, this rule invites threats of censorship, as well as subtle forms of coercion and jawboning by the government.

While this rule was originally asserted due to the inherently limited number of licenses granted to radio stations and TV broadcasts and the desire for those select media organizations to be honest and fair, today there is an abundance of media choices that users can turn to if they believe a broadcaster is distorting the news. These alternatives both on TV and on the internet are not subject to the news distortion rule, allowing them to lawfully express themselves as they see fit with no concern that the FCC may someday investigate their reporting. This puts broadcasters at a competitive disadvantage versus their modern challengers.

The news distortion rule is antiquated, relies on dubious theories of media outlet scarcity, and has never been authorized in a statute. The modern market for news has no need for a subjective, anti-competitive news distortion rule that chills broadcasters' speech. The FCC should "delete" and rescind this uncodified rule and associated guidance documents.

Universal Service Fund Contributions

The FCC should eliminate its current Universal Service Fund (Fund) contribution method,[5] and its associated rules codified at 47 CFR Part 54, because it functions as an unauthorized tax.[6] The Commission should replace the current tax on phone service revenues with a flat fee for telecommunications companies. This avoids a constitutional problem with the current implementation of Section 254 of the Telecommunications Act and better aligns the function of Fund with the intent of Congress.

Currently, the FCC and its Universal Service Administration Company collect a fixed percentage of telecommunications companies' long-distance service revenues, deposits the money in the U.S. Treasury, and spends the funds on a public welfare program. In a word, the Fund operates as an unconstitutional tax. The "support" is a tax because it "inure[s] to the benefit of the public,"[7] namely, the favored public constituencies named in Section 254 of the

[5] 47 CFR § 54.706(b).
[6] See, e.g., Consumers' Research v. Federal Communication Commission, No. 22-60008 (5th Cir. July 24, 2024).
[7] Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 223 (1989).

Telecommunications Act.[8] The Supreme Court has said that an agency cannot constitutionally establish tax policy because "[t]axation is a legislative function."[9]

A "fee," on the other hand, is a "charge" that corresponds to "a benefit voluntarily sought by the payer."[10] Repealing the current contribution rules has several public interest benefits. Repeal protects the FCC from allegations and adverse court rulings it is implementing an unconstitutional tax. A fee system also simplifies the FCC's operations and control of the USAC.

Finally, replacement with a fixed fee would also likely reduce the amount of FCC exactions from telecommunications companies and their customers, consistent with the original congressional goals for the Fund. For instance, at the time of passage of the Telecommunications Act and the creation of the Fund, members of Congress and the Congressional Budget Office (CBO) expected the cost of Fund programs to decrease over time.[11] Despite this, the program has grown larger over thirty years, despite the increased facilities-based competition. Senator Ted Stevens, in fact, noted during debate on the Telecommunications Act that CBO estimated that the cost of providing universal service would decline by billions of dollars after passage of the act.[12] The FCC should seek to honor that intent by scrutinizing existing programs and reducing the cost of the Fund programs where competition provides pricing pressure.

Conclusion

The FCC is to be commended for seeking to remove harmful regulations and rules. The news distortion rule and the current contribution method of the Universal Service Fund are two such targets worthy of deletion.

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[8] 47 U.S.C. 254(b).
[9] National Cable Television Association v. United States, 415 U.S. 336, 340 (1974).
[10] Ronald J. Krotoszynski, Jr., "Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine," *Indiana Law Journal* 80, no. 2 (2005): 239, 270.
[11] "The Committee expects that competition and new technologies will greatly reduce the actual cost of providing universal service over time, thus reducing or eliminating the need for universal service support mechanisms as actual costs drop to a level that is at or below the affordable rate for such service in an area . . ." S. Rep. No. 104-23 (1995), H.R. Rep. No. 104-204, pt. 1, at 60 (1995), and "Over time, CBO expects . . . the total amount of [USF] subsidies necessary would decline." Arnold & Porter Legislative History, S. Rep. No. 104-104, at 60 (1995).
[12] Said Senator Ted Stevens during debate on the act, "In fact, I find it interesting that the Congressional Budget Office has said that this bill will reduce the cost of universal service from the existing system by at least $3 billion over the next five years," 141 Cong. Rec., S7881 (1995), and Arnold & Porter Legislative History, S. Rep. No. 104-104, at 210 (1995).